

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of

	)	
Presubscribed Interexchange Carrier Changes	)	CC Docket No. 02-53
	)	CCB/CPD File No. 01-12
	)	RM-10131

**REPLY COMMENTS OF  
VICERA COMMUNICATIONS, INC.  
D/B/A GENESIS COMMUNICATIONS INTERNATIONAL**

Vicera Communications, Inc. d/b/a Genesis Communications International (“Genesis”) respectfully submits these reply comments in the above-captioned proceeding.<sup>1</sup>

**I. Introduction**

Genesis is a full service telecommunication company providing value-added local and long distance services in numerous states. By these comments, Genesis urges the Commission to eliminate the \$5.00 safe harbor for ILEC PIC-change charges and instead require ILECs to provide cost-based justification for primary interexchange carrier (“PIC”) change fees. The Commission should not take into account non-cost factors in reviewing ILEC PIC-change rates, and should limit the allowable costs recovered through ILEC PIC-change charges to costs that are directly attributable to the process of changing a customer’s PIC. The ILEC PIC-change

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<sup>1</sup> *Presubscribed Interexchange Carrier Changes*, CC Docket No. 02-53, CCB/CPD File No. 01-12, and RM-10131, Order and Notice of Proposed Rulemaking, rel. March 20, 2002 (“*Order*” and “*NPRM*”), 67 FR 34665 (May 15, 2002).

charge should not include any costs purportedly attributable to “administering slamming complaints” or for compliance with the Commission’s slamming rules.

Genesis submits that the Commission’s reasons for creating a \$5.00 safe harbor for incumbent LEC PIC-change charges are no longer valid.<sup>2</sup> Specifically, the Commission cannot continue to justify non-cost-related PIC-change charges based on purported difficulties in developing cost support data, since the ILECs now have over fifteen years of experience from which cost-support data may be derived. The Commission also should not continue to sanction non-cost based PIC-change charges on grounds that such inflated charges would discourage consumers from switching back and forth between carriers. Such a policy does not promote the public interest and is in stark conflict with the pro-competitive goals of the Telecommunications Act of 1996.

ILEC arguments that the Commission should maintain the \$5.00 safe harbor because the costs of PIC-change functions might *exceed* the current \$5.00 safe harbor level are transparent and self-serving, and are belied by the fact that, as the Commission has recognized, during the past fifteen years incumbent LECs have not submitted any requests to the Commission seeking to recover any alleged costs above the safe harbor.<sup>3</sup> As AT&T pointed out in its Reply Comments to CompTel’s Petition, “the ILECs face no effective competitive constraints on the level of those charges to their end users of IXC access customers. Thus, if the ILECs’ costs of providing that function were markedly higher than the safe harbor level, those carriers would have had every incentive already to file higher, cost-supported change charges. The fact that

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<sup>2</sup> See discussion in CompTel’s *Petition for Rulemaking Regarding Presubscribed Interexchange Carrier Charges*, RM-10131, filed May 16, 2001 (“CompTel Petition”) at 6-7.

<sup>3</sup> *NPRM* at para. 11.

almost none of the ILECs has done so speaks volumes about the true cost-price relationship of the charges.”<sup>4</sup>

Despite the Commission’s request in the *NPRM* that parties possessing such information “provide the individual functions that make up the PIC-change process, describe such process in detail, and explain why each function is necessary,” and “identify by function the services that are automated,”<sup>5</sup> Genesis notes that no ILEC has provided this type of information. Instead, the majority of the ILEC commenters merely state that the Commission should maintain (or increase) the \$5.00 safe harbor, without providing any information regarding the mechanics of PIC-change processing that the Commission requested. Moreover, contrary to SBC’s assertion in that automation has not resulted in lower costs,<sup>6</sup> the Commission has found that “LECs have, in fact, realized substantial cost savings from the automation of their PIC-change process over the past fifteen years.”<sup>7</sup>

Genesis agrees with AT&T that non-cost based PIC-change charges provide “an additional – and wholly unjustifiable – subsidy to ILECs that increasingly are becoming direct competitors of IXC’s in established toll markets, as well as in emergingly competitive local services.”<sup>8</sup> In fact, the Commission has previously recognized that once ILECs are allowed to offer in-region long distance service, “a PIC-change charge greater than the cost of providing

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<sup>4</sup> AT&T Reply Comments to CompTel Petition, RM No. 10131, CCB/CPD 01-12 (June 18, 2001) (“AT&T Reply Comments”) at n.8.

<sup>5</sup> *NPRM* at para. 16.

<sup>6</sup> SBC Reply Comments to CompTel Petition, RM No. 10131, CCB/CPD 01-12 (June 18, 2001) at 1.

<sup>7</sup> *MCI Telecommunications Corporation v. U S West Communications, Inc., et al.*, (Memorandum Opinion and Order), 15 FCC Rcd. 9328, ¶ 14 (2000) (“*MCI Complaint Order*.”)

<sup>8</sup> See also ASCENT comments to CompTel Petition, RM No. 10131, CCB/CPD 01-12 (June 18, 2001) at 4; Excel comments to CompTel Petition, RM No. 10131, CCB/CPD 01-12 (June 18, 2001) at 4-5.

this service might give them a competitive advantage over non-local exchange carrier providers of long distance service.”<sup>9</sup>

Genesis is particularly concerned regarding the anti-competitive incentives and opportunities that inflated, non-cost-based ILEC PIC-change charges entail. For example, Genesis agrees with AT&T and WorldCom that the current safe harbor regime increases anti-competitive incentives for ILECs to “mislabel” winback sales as disputes.<sup>10</sup> As a result of such mischaracterizations, ILECs obtain a windfall at the expense of its IXC competitors. Even in the absence of such “mislabeling” in connection with winback practices, inflated PIC-change charges in and of themselves provide ILECs with anti-competitive “pricing squeeze” opportunities as ILECs obtain Section 271 authority to provide long distance service.

For the reasons discussed herein, and particularly in light of the anticompetitive effects and incentives of allowing ILECs to charge inflated PIC-change rates, Genesis urges the Commission to require ILECs to provide cost-based justification for PIC-change charges, and to strictly limit costs recoverable through the PIC-change charge to those costs directly attributable

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<sup>9</sup> *MCI Complaint Order* at n. 30.

<sup>10</sup> As WorldCom commented, some purported slamming allegations occur during ILEC-initiated contact with consumers, and “the evidence also indicates that the majority [of these] were purely ‘winbacks.’ Consumers changing carriers should not be forced to pay ILEC marketing costs. Additionally, an above cost fee for PIC changes encourages ILECs to miscode winbacks as alleged unauthorized conversions. It allows them to obtain a profit on the winback without having to charge the end-user – by assessing a fee against the purported unauthorized carrier.” WorldCom comments to *NPRM*, CC Docket No. 02-53 (June 14, 2002) at 6. In its comments on the CompTel Petition, AT&T noted that “after intraLATA presubscription was implemented in California in May, 1999, AT&T and other carriers began marketing those toll services to customers and succeeded in obtaining authorizations from many such subscribers to convert from Pacific Bell as their presubscribed intraLATA carrier. In numerous instances, Pacific Bell thereafter engaged in ‘winback’ marketing to these same customers and convinced them to redesignate Pacific Bell as their intraLATA carrier. However, instead of assessing the applicable charge on those customers for a voluntary carrier change, Pacific Bell assessed ‘PIC switchback’ charges totaling nearly \$1 million on AT&T alone, under the pretext that these carrier changes were the result of slamming claims by the affected customers. This stratagem allowed Pacific Bell to avoid having to reimburse customers for their voluntary changes back to Pacific Bell (without which those subscribers might not have been willing to change their intraLATA service to the ILEC), and to burden its competitor AT&T with the charges for those carrier changes.” AT&T comments to CompTel Petition, RM No. 10131; CCB/CPD 01-12 (filed June 18, 2001) at 6-8 (cites omitted). Genesis has experienced the same ILEC abuses as those described by AT&T and WorldCom.

to the process of changing a customer's PIC. Genesis agrees with ASCENT that in the interim, while the Commission reviews ILEC cost support submissions in the context of required tariff filings, the Commission should establish a temporary safe harbor in the amount of \$1.49, the PIC-change amount charged by BellSouth for the past ten years.<sup>11</sup>

## **II. The Commission Should Require ILECs to Provide Cost-Based Justification for PIC-Change Charges**

Genesis urges the Commission to require the ILECs to provide cost-based justification for PIC-change charges. The other methods suggested by the Commission in the *NPRM* will not adequately protect the public interest and ensure the reasonableness of ILEC PIC-change charges. Specifically, the Commission seeks comment on whether it may rely on market forces to ensure reasonable PIC-change charge rates.<sup>12</sup> As the Commission has recognized, “[w]hen a market is not competitive we cannot rely on market forces to constrain rates.”<sup>13</sup> Genesis agrees with AT&T and WorldCom that the Commission cannot rely on market forces to ensure the reasonableness of ILEC PIC change rates because end-users do not have alternative choices for this service, nor do competitive IXCs.<sup>14</sup> Given the absence of a competitive market for PIC changes, the Commission should require the incumbent LECs to provide cost-based justification for their PIC-change charges.

Genesis also submits that the Commission cannot rely on the formal complaint process or other enforcement mechanisms to ensure the reasonableness of ILEC PIC-change charges. The

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<sup>11</sup> See ASCENT comments at 16 (“While even this safe harbor amount ultimately may be proven to be unduly high, it is preferable for the Commission to provide some measure of relief to the competitors of incumbent LECs and their end-user customers rather than to allow an above-cost PIC change charge, already nearly two decades old, to continue during the pendency of the necessary cost proceedings.”)

<sup>12</sup> *NPRM* at para. 15.

<sup>13</sup> *NPRM* at para. 15, citing Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers, CC Docket No. 96-262, 16 FCC Rcd 9923, 9948, para. 59 (2001) (“imposing a tariff benchmark mechanism on competitive LEC access charges due to the failure of market forces to restrain rates.”)

<sup>14</sup> See WorldCom comments on *NPRM* at 2; AT&T comments on *NPRM* at 4-5 and n.5.

IXCs do not have access to the necessary information regarding the ILECs' current costs, and the Commission's formal complaint process provides only a very limited opportunity for discovery.<sup>15</sup> Furthermore, the formal complaint process is cost prohibitive for most IXCs. It simply is not an option for most IXC competitors to expend the time, money, and human resources to engage in a formal complaint process. In addition, as evidenced by the Commission's denial of MCI's complaint in the *MCI Complaint Order*, carriers in effect are foreclosed under the current safe harbor regime from challenging inflated and unreasonable ILEC PIC-change fees. As a result, the Commission's formal complaint process and enforcement mechanisms do not provide sufficient means by which to ensure the reasonableness of the ILECs PIC-change rates.

**III. The Commission Should Take Into Account Only Cost Factors and Should Limit Costs Recovered to Those Costs Directly Attributable to the Process of Changing a Customer's PIC**

**A. Inflated ILEC PIC-Change Charge Should Not Be Justified as a Means of Discouraging Consumers from Switching Long Distance Carriers**

The Commission should not take into account non-cost factors in determining a reasonable charge. Specifically, the Commission cannot justify inflated ILEC PIC-change charges as a means of discouraging consumers from switching long distance carriers, as such a policy is contrary to the Commission's objectives under the Telecommunications Act of 1996. As the Commission recognized in the *NPRM*, "the ability of end users to change carriers easily has contributed to the competitiveness of [the long distance] market,"<sup>16</sup> and "[t]he ability of end users to change carriers easily and for any reasons gives long distance carriers an incentive to

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<sup>15</sup> Genesis agrees with AT&T that "Although the information necessary to determine whether a PIC change charge rate reflects no more than an ILEC's current costs is exclusively within that carrier's possession, the Commission's formal complaint process contemplates that complainants will already have access to that information and provides only limited opportunity even for permissive discovery." AT&T Comments on *NPRM* at n 13 (cites omitted).

<sup>16</sup> *NPRM* at para. 8.

provide their services at reasonable rates.”<sup>17</sup> There is no policy reason to discourage consumers from switching long distance carriers. To the contrary, providing ILECs a windfall by allowing them to charge inflated PIC-change fees is contrary to the public interest and may contribute to ILEC incentives to abuse PIC-change charges as the ILECs enter the long distance market under Section 271 authority. Such a policy does not promote the public interest and clearly conflicts with the pro-competitive goals of the Telecommunications Act of 1996.

B. PIC-Change Charges Should Not Include Costs Related to PIC Freezes, “Total Company Costs,” or Any Costs Related to PIC-Change Investigations

Genesis urges the Commission to allow only the recovery of costs related to the actions necessary to process a request and implement the change through the PIC-change charge. Other types of costs should not be included in the PIC-change charge. Specifically, the Commission should not allow ILECs to recover costs for PIC freezes. Genesis agrees with WorldCom that “ILECs should not be permitted to include the costs associated with other services, such as their PIC freeze offerings (a service the majority of end-users have opted not to use), in the PIC change charge,” and that “consumers should not be forced to bear the additional costs for services they have neither requested nor received. The inclusion of PIC freeze costs in the carrier change charge is even more unjust since those that do *not* subscribe to the freeze service are more apt to be the ones to change their service and incur the fee.”<sup>18</sup> The PIC-change charge should not subsidize users of the PIC freeze. The Commission should rule that ILECs may *not* recover the costs of administering slamming complaints through the PIC-change charge.

The Commission also should reject SBC’s proposal to include in the PIC charge a percentage of a carrier’s “total company common costs,” including “legal, executive, marketing

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<sup>17</sup> *NPRM* at para. 12.

<sup>18</sup> Worldcom comments at 5.

and additional overhead costs.”<sup>19</sup> These types of charges do not relate to the function of entering a PIC-change order and should not be included in ILEC PIC charges. Moreover, the inclusion of these types of charges would only provide ILECs with even greater anticompetitive incentives and opportunities with respect to ILEC PIC-change charges. For example, with respect to the types of ILEC PIC-change and “winback” practices discussed on the record in these proceedings by WorldCom and AT&T,<sup>20</sup> the inclusion of such “total company common costs” potentially could allow the ILEC to recover from its competitors via an inflated PIC-change charge a portion of the ILEC’s “winback” and other marketing costs, as well as a portion of its legal costs in defending actions such as AT&T’s complaint against Pacific Bell in California.<sup>21</sup> Clearly, the Commission should not permit these types of expenses to be included in the PIC-change charge.

The Commission also inquired in the *NPRM* whether or not it is appropriate for ILECs to “recover the costs of administering slamming complaints through the PIC-change charge.”<sup>22</sup> The Commission should not allow ILECs to recover any costs related to “administering slamming complaints” or any other costs related to compliance with the Commission’s slamming rules. Genesis believes that limiting ILEC PIC-change charge recovery to the actual cost of processing automated changes may reduce the incentive for ILEC abuse of PIC-change charges.

ILECs are not neutral “administrators” of PIC-change charges with respect to intraLATA toll services and with respect to long distance service where ILECs have obtained Section 271 authority. ILECs compete directly with IXC for intraLATA toll customers and, in some states,

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<sup>19</sup> See SBC comments at 6.

<sup>20</sup> See *supra* n. 10; WorldCom comments to *NPRM*, CC Docket No. 02-53 (June 14, 2002) at 6; WorldCom *Ex Parte* Notice, CC Docket No. 94-129; CCB/CPD No. 01-12; an RM No. 10131, Sept. 6, 2001; AT&T comments to CompTel Petition, RM No. 10131; CCB/CPD 01-12 (filed June 18, 2001) at 6-8.

<sup>21</sup> See Complaint in AT&T Communications of California, Inc. v. Pacific Bell, et al., Case No. 99-12-029 (Cal. PUC 1999).

<sup>22</sup> *NPRM* at para. 10.



for IXC customers. Consequently, the opportunity for PIC-change charge abuse is an issue that the Commission should seriously consider in this proceeding.

Based on its own experiences regarding certain ILEC “winback” practices leading to the imposition of manufactured PIC-change charges (similar to those described by AT&T and WorldCom in their comments in these proceedings),<sup>23</sup> Genesis is concerned about the increasing occurrence of and potential for ILEC abuse of PIC-change charges, particularly in light of ILEC Section 271 authority. In order to reduce or mitigate ILEC anti-competitive incentives that may result from inflated PIC-change charges, the Commission should eliminate the \$5.00 safe harbor and require ILECs to provide cost justification for PIC-change fees. Moreover, ILECs should not be allowed to recover costs related to “slamming administration” or costs related to compliance with the slamming rules, including slamming complaint reporting requirements, since the costs of complying with the Commission’s rules affect all carriers. Genesis agrees with ASCENT that

*all carriers*, not merely incumbent LECs, incur real costs in responding to customer inquiries and concerns regarding unauthorized PIC changes and *all carriers* have experienced an increase in the amount of time spent with customers as a result of the Commission’s slamming rules. Those rules impose no burdens on incumbent LECs which are not also borne by all other carriers, and absolutely no justification exists pursuant to which incumbent LECs alone might be allowed to minimize their own costs of complying with those rules by over-recovering PIC change costs from their competitors.<sup>24</sup>

Moreover, as ASCENT points out, “the Commission has affirmatively prohibited executing carriers from undertaking investigatory actions on its own initiative,” so that,

putting aside the actual costs associated with executing a PIC change, the Commission’s slamming rules and regulations impose no costs upon incumbent LECs which do not affect generally all telecommunications carriers. There can be, therefore, no justification for allowing incumbent LECs to recover such generally applicable costs through PIC

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<sup>23</sup> See *supra* n.10.

<sup>24</sup> ASCENT comments to *NPRM* at 10.

change charges, especially when such extraneous costs would be borne by ILECs' competitors, and ultimately the consumers seeking to exercise their freedom to choose a telecom provider.<sup>25</sup>

For these reasons, Genesis urges the Commission to rule that ILEC PIC-change charges may not include any costs related to "slamming complaint administration" or compliance with the Commission's slamming rules.

#### **IV. Conclusion**

The record in this proceeding reflects that ILEC PIC-change charges are inflated and contribute to anti-competitive ILEC incentives and opportunities for ILEC abuse of such charges. Therefore, the Commission should eliminate the \$5.00 safe harbor for ILEC PIC-change charges and require ILECs to submit PIC-change charge tariff filings along with cost studies to support their PIC-change charges. In the interim, the Commission should establish a temporary safe harbor in the amount of \$1.49 interim during the pendency of such cost proceedings.

Respectfully submitted,



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<sup>25</sup> *Id.* at 15.